



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
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TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

LORI GRIFA
Acting Commissioner

FINAL DECISION

April 28, 2010 Government Records Council Meeting

Anthony Valente, Jr.
Complainant

Complaint No. 2009-126

v.

Town of Harrison (Hudson)
Custodian of Record

At the April 28, 2010 public meeting, the Government Records Council (“Council”) considered the April 21, 2010 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that based upon established prior Court and GRC decisions in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005) and the Council’s decision in Feiler-Jampel v. Somerset County Prosecutor’s Office, GRC Complaint No. 2007-190 (March 2008), the Complainant’s request is overly broad and unclear since the Complainant does not name specifically identifiable records when he failed to be specific about the inspections, communications, vouchers, and extra work for which the vouchers relate. Despite this, the Custodian did act in good faith by providing the entire Streetscape Project file and offered the Complainant the opportunity to inspect said file to identify which records the Complainant wanted copied. Therefore, it is concluded that the Custodian did not unlawfully deny the Complainant access to the requested records when said request did not name specifically identifiable records.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 28th Day of April, 2010



Robin Berg Tabakin, Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Janice L. Kovach, Secretary
Government Records Council

Decision Distribution Date: April 30, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
April 28, 2010 Council Meeting**

**Anthony Valente, Jr.¹
Complainant**

GRC Complaint No. 2009-126

v.

**Town of Harrison (Hudson)²
Custodian of Records**

Records Relevant to Complaint:

- (1) Any and all inspections made by construction and engineering departments of streetscape project between 3rd Street and F.E.R Boulevard (“Blvd.”), including date, day, time and by whom.
- (2) Any and all communications with Tecon Construction (East Orange) and Foreman Joe Ventrua via phone calls, etc. This includes inspections of oil tank and new boiler.
- (3) Any and all vouchers for extra work.

Request Made: February 23, 2009 and March 5, 2009

Response Made: March 3, 2009 and March 10, 2009

Custodian: Paul J. Zarbetski, Municipal Clerk & Attorney

GRC Complaint Filed: April 16, 2009³

Background

February 23, 2009

Complainant’s first (1st) Open Public Records Act (“OPRA”) request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

March 3, 2009

Custodian’s response to the first (1st) OPRA request. The Custodian responds in writing to the Complainant’s OPRA request on the sixth (6th) business day following receipt of such request. The Custodian states that after reviewing the records of the Construction Office it was determined that the cost of copying such records will be approximately \$352.50. Further, the Custodian informed the Complainant that if he wants copies to let the Custodian know and that a deposit will be required. Additionally,

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The GRC received the Denial of Access Complaint on said date.

the Custodian annotated on the request form that, per the Complainant's advice, no copies would be made but the records were available for inspection.

March 5, 2009

Complainant's second (2nd) Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.⁴

March 10, 2009

Custodian's response to the second (2nd) OPRA request. The Custodian responds in writing to the Complainant's OPRA request on the third (3rd) business day following receipt of such request. The Custodian states that the Complainant's March 5, 2009 OPRA request is identical to the OPRA request submitted on February 23, 2009 to which the Custodian responded by letter dated March 3, 2009. The Custodian states that a copy of said response letter is attached and that the estimated copy cost of all records responsive is \$352.50. The Custodian further states that inspection of the records is free of charge and may be done at any time.

April 16, 2009

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- Complainant's two (2) OPRA requests dated February 23, 2009 and March 5, 2009
- Letter from the Custodian to the Complainant dated March 3, 2009

The Complainant asserts that he wanted to copy the entire streetscape project rather than one (1) specific block. The Complainant further asserts that he asked for the area between third (3rd) Street and F.E.R Blvd.

The Complainant agrees to mediate this complaint.

May 15, 2009

Offer of Mediation sent to the Custodian.

June 2, 2009

Custodian agreed to mediate the complaint.

June 10, 2009

Complaint referred to mediation.

December 11, 2009

Complaint referred back from mediation for a full investigation of this complaint.

February 1, 2010

Request for the Statement of Information ("SOI") sent to the Custodian.

⁴ The second OPRA request was an exact duplication of the first request.

February 11, 2010

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated February 23, 2009
- Letter from the Custodian to the Complainant dated March 3, 2009
- Complainant's OPRA request dated March 5, 2009
- Letter from the Custodian to the Complainant dated March 5, 2009

The Custodian certifies he obtained the requested records by searching the files of the Engineering Department.⁵

The Custodian certifies that on or about February 23, 2009, the Complainant filed an OPRA request with the municipal clerk for the records relevant to this complaint and maintained by the Harrison Engineer's Office. The Custodian also certifies that based on the broad and unclear nature of the request, the Custodian was not sure which records the Complainant wanted. Specifically, the Custodian certifies that the Streetscape Project extends from Third (3rd) Street to Fifth (5th) Street (or 2 blocks) and the files are not separated according to each block. Therefore, the Custodian certifies that he would have to make assumptions regarding which records the Complainant wanted.

Further, the Custodian certifies that it is settled law that a custodian may deny access if the request does not name specifically identifiable government records. The Custodian argues that it is clear that the Complainant's request fails to name specifically identifiable government records. The Custodian also certifies that the Town does not like to deny requests and tries whenever possible to work with a requestor to gain clarification so that the records requested may be produced. However, the Custodian certifies that when he verbally attempted to gain clarification of the Complainant's request, the Complainant became combative and refused to provide any clarification.

The Custodian certifies that based on the foregoing, he provided all records maintained on the Streetscape Project and informed the Complainant that the file (consisting of 1,093 pages) would cost \$352.50 to reproduce. In the alternative, the Custodian certifies that he informed the Complainant that he may inspect the file at no charge at any time and pick those records the Complainant wished to be copied.

Lastly, the Custodian certifies that the Town acted in good faith and that there was no denial of records. The Custodian asserts that for this reason, the instant complaint should be dismissed in its entirety.

Analysis

Whether the Custodian unlawfully denied access to the requested records?

⁵ The Custodian did not certify as to the last date upon which records that may have been responsive to the request were destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management ("DARM").

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In this complaint, the Complainant asserts that he wanted to copy the entire streetscape project rather than one (1) specific block. The Complainant further asserts that he asked for the area between third (3rd) Street and F.E.R Blvd.

Conversely, the Custodian certified in the SOI that it is settled law that a custodian may deny access to a request if it does not name specifically identifiable government records. The Custodian argued that it is clear that the Complainant’s request failed to name specifically identifiable government records. The Custodian further certified that the Town does not like to deny requests and tries whenever possible to work with a requestor to gain clarification so that the records requested may be produced. The Custodian also certified that when he verbally attempted to gain clarification of the Complainant’s request, the Complainant became combative and refused to provide any clarification.

As to the determination of whether the Complainant’s request is broad and unclear, the New Jersey Superior Court has held that “[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records ‘readily accessible for inspection, copying, or*

examination.' N.J.S.A. 47:1A-1." (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005). The Court further held that "[u]nder OPRA, agencies are required to disclose only 'identifiable' government records not otherwise exempt ... In short, OPRA does not countenance open-ended searches of an agency's files." (Emphasis added.) *Id.* at 549.

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),⁶ the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records "accessible." "As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents."⁷

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) the court cited MAG by stating that "...when a request is 'complex' because it fails to specifically identify the documents sought, then that request is not 'encompassed' by OPRA..." The court also quoted N.J.S.A. 47:1A-5.g in that "[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency." The court further stated that "...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency's need to...generate new records..."

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009) the Council held that "[b]ecause the Complainant's OPRA requests # 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005)."

In Feiler-Jampel v. Somerset County Prosecutor's Office, GRC Complaint No. 2007-190 (March 2008), the Complainant requested "[a]ny and all documents and evidence" relating to an investigation being conducted by the Somerset County Prosecutor's Office. The GRC reasoned that while the Complainant's request was for an entire investigation file identified by number and containing numerous individual records, the Complainant failed to identify specific government records. The GRC held that:

"because the records requested comprise an entire SCPO file, the request is overbroad and of the nature of a blanket request for a class of various documents rather than a request for specific government records. Because OPRA does not require custodians to research files to discern which

⁶ Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

⁷ As stated in Bent, *supra*.

records may be responsive to a request, the Custodian had no legal duty to research the SCPO files to locate records potentially responsive to the Complainant's request pursuant to the Superior Court's decisions in MAG, supra and Bent, supra and the Council's decisions in Asarnow, supra and Morgano, supra."

In the matter currently before the Council, the Complainant's requests fail to identify specific records and are blanket requests for information rather than requests for specific government records. Therefore, because OPRA does not require custodians to research files to discern which records may be responsive to a request, the Custodian had no legal duty to research the Engineer's Office files to locate records potentially responsive to the Complainant's requests pursuant to the Superior Court's decisions in MAG, supra and Bent, supra and the Council's decision in Feiler-Jampel, supra.

Based upon established prior Court and GRC decisions in MAG, supra and Bent, supra and the Council's decision in Feiler-Jampel, supra, the Complainant's request is overly broad and unclear since the Complainant does not name specifically identifiable records when he failed to be specific about the inspections, communications, vouchers, and extra work for which the vouchers relate. Despite this, the Custodian did act in good faith by providing the entire Streetscape Project file and offered the Complainant the opportunity to inspect said file to identify which records the Complainant wanted copied. Therefore, it is concluded that the Custodian did not unlawfully deny the Complainant access to the requested records when said request did not name specifically identifiable records.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that based upon established prior Court and GRC decisions in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005) and the Council's decision in Feiler-Jampel v. Somerset County Prosecutor's Office, GRC Complaint No. 2007-190 (March 2008), the Complainant's request is overly broad and unclear since the Complainant does not name specifically identifiable records when he failed to be specific about the inspections, communications, vouchers, and extra work for which the vouchers relate. Despite this, the Custodian did act in good faith by providing the entire Streetscape Project file and offered the Complainant the opportunity to inspect said file to identify which records the Complainant wanted copied. Therefore, it is concluded that the Custodian did not unlawfully deny the Complainant access to the requested records when said request did not name specifically identifiable records.

Prepared and
Approved By: Catherine Starghill, Esq.
Executive Director

April 21, 2010